

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CINDY A. BECK

Claimant

VS.

U.S.D. 475

Respondent

AND

**KANSAS ASSOC. OF SCHOOL
BOARDS WC FUND INC.**

Insurance Carrier

Docket No. 1,039,614

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 10, 2010, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant is entitled to medical care and authorized Dr. Ryan Knopp to be her authorized treating physician for monitoring and providing pain medication.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 9, 2010, Preliminary Hearing and the exhibits; the transcript of the August 13, 2008, Preliminary Hearing and the exhibits; the transcript of the Evidentiary Deposition of Stuart N. Ford taken December 2, 2009, and the exhibits; and the transcript of the Evidentiary Deposition of Stu Macfarlane taken December 2, 2009, and the exhibits; together with the pleadings contained in the administrative file.

ISSUES

The respondent requests review of this decision and alleges the ALJ exceeded her authority by designating Dr. Knopp as the authorized treating physician rather than giving respondent the opportunity to provide a list of three physicians from which claimant can select one to direct her treatment.

Claimant argues the respondent's appeal should be dismissed as the Board does not have jurisdiction to address respondent's issue on appeal from a preliminary hearing. In the alternative, claimant requests the Board to affirm the ALJ's Order.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issue in this appeal?

(2) If so, did the ALJ exceed her jurisdiction in naming Dr. Knopp as claimant's authorized treating physician without allowing respondent to provide a list of three physicians from which claimant can select one to direct her treatment?

FINDINGS OF FACT

Claimant suffered a work-related injury to her back on October 1, 2007. She was prescribed Percocet as a pain reliever by the first medical provider and it was continued when she was seen by Dr. M. Camden Whitaker, to whom she was referred by respondent. However, when Dr. Whitaker found her to be at maximum medical improvement (MMI), he refused to continue her prescription, telling her he was unable to do so because he was no longer her physician. Because respondent did not provide claimant with a physician to continue her medication, she went to her personal physician, Dr. Knopp, for her prescriptions for Percocet. Claimant testified she has not tried to go without the Percocet because her pain makes her too miserable. In January 2010, claimant asked respondent for a physician to be authorized for ongoing treatment for her back and pain management, but respondent refused. Therefore, she asked the ALJ to order that Dr. Knopp be authorized as her treating physician to prescribe and monitor her medications.

Respondent argues that Dr. Paul Stein is claimant's authorized treating physician. Dr. Stein's report of February 11, 2010, indicates that claimant was at MMI when he evaluated her on December 8, 2008, since she refused to have surgery. Dr. Stein made no recommendation for any other treatment, stating that claimant had undergone a complete course of conservative management.

At the preliminary hearing, the ALJ asked respondent's counsel: "Does the respondent want to provide three or [sic] if that's what I decide?"¹ Respondent's counsel answered: "If you decide she needs medication, we'll provide her a list of three."² Nevertheless, the ALJ authorized claimant's primary physician, Dr. Knopp, to be claimant's authorized treating physician to monitor and provide pain medication without giving respondent an opportunity to provide a list of three physicians to claimant.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

K.S.A. 44-510j(h) states in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

¹ P.H. Trans. (Mar. 9, 2010) at 21.

² *Id.*

K.S.A. 44-534a(a)(2) states in part:

Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) whether the injury arose out of and in the course of the employee's employment;
- (3) whether notice is given or claim timely made;
- (4) whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.³

Here, respondent alleges the ALJ exceeded her jurisdiction in granting claimant's request to change her authorized treating physician to Dr. Knopp. However, because no physician was currently authorized to provide treatment, claimant was not requesting a change of physician. Instead, claimant was requesting that the ALJ determine she is in need of ongoing treatment and to authorize a physician to provide that treatment. The Board has ruled in the past and continues to hold that this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing order.⁴ Whether the ALJ must, in a given set of circumstances, authorize treatment from a list of three physicians

³See K.S.A. 2009 Supp. 44-551.

⁴See *Hubbard v. Wesley Medical Center, LLC*, No. 1,040,850, 2008 WL 5122323 (Kan. WCAB Nov. 7, 2008); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219, 395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

designated by respondent is not a question which goes to the jurisdiction of the ALJ. At a preliminary hearing, an ALJ has the jurisdiction to decide questions concerning the furnishing of medical treatment.

While there is generally no jurisdiction to consider matters of medical treatment, whether an ALJ exceeds his or her jurisdiction is jurisdictional. After a thorough review of the file this Board Member finds nothing to suggest that the ALJ exceeded her jurisdiction in making her decision. ALJs must routinely determine the most appropriate method of treatment in order to satisfy the Act's goal of curing and relieving the effects of the injury.⁵ Determinations of whether claimant is at maximum medical improvement, whether claimant is in need of additional medical treatment, and selecting one treatment provider over another do not equate to decisions that exceed the ALJ's authority. Rather, as is contemplated under K.S.A. 44-534a, the ALJ determined issues regarding the furnishing of medical treatment.

In *Allen*,⁶ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁷ Accordingly, respondent's appeal is dismissed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

⁵K.S.A. 2009 Supp. 44-510h(a).

⁶*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁷See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁸ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁹ K.S.A. 2009 Supp. 44-555c(k).

CONCLUSION

The Board does not have jurisdiction over the issue of whether the ALJ exceed her jurisdiction in naming Dr. Knopp as claimant's authorized treating physician without allowing respondent to provide a list of three physicians from which claimant can select one to direct her treatment.

ORDER

WHEREFORE, it is the finding of the Board that the respondent's appeal is dismissed and Administrative Law Judge Rebecca Sander's Order of March 10, 2010, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of May, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge